

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2011-000690-001 DT

05/22/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT  
K. Waldner  
Deputy

STATE OF ARIZONA

SHAWNA L BRUMBAUGH

v.

BRIAN R KOTARSKI (001)

JONATHAN JOSEPH GOEBEL

PEORIA MUNICIPAL COURT  
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

**Lower Court Case Number TR 2009–010334.**

Defendant-Appellant Brian Kotarski (Defendant) was convicted in Peoria Municipal Court of driving under the influence. Defendant contends the trial court erred in denying his Motion To Dismiss, which alleged the conduct of the officer violated his right to a private telephone conversation with counsel. For the following reasons, this Court affirms the judgment and sentence imposed.

**I. FACTUAL BACKGROUND.**

On October 5, 2009, the State filed a Complaint charging Defendant with driving under the influence, A.R.S. § 28–1381(A)(1) and driving under the extreme influence, A.R.S. § 28–1382(A)(1). Prior to trial, Defendant filed a Motion To Dismiss that alleged the conduct of the officer violated his right to a private telephone conversation with counsel.

At the hearing on Defendant's motion, Officer Robert Miller testified he was on duty on July 19, 2009, in the area of Lake Pleasant. (R.T. of Aug. 26, 2010, at 6, 8.) At approximately 10:26 p.m., he received a report of a possible drunk driver. (*Id.* at 9.) Near 87<sup>th</sup> Avenue and SR–74, he saw a black Corvette that matched the description of the reported vehicle, and upon following it, paced it at 70 mph in a 55 mph zone. (*Id.* at 10.) He therefore stopped the vehicle and spoke to the driver, whom he identified as Defendant. (*Id.* at 10, 31.) While talking to Defendant, he noted Defendant had a strong smell of alcohol on his breath and his shirt was mis-buttoned. (*Id.* at 10.) Officer Miller asked Defendant to exit the vehicle and perform some field sobriety tests, so Defendant got out of the vehicle, walked approximately 15 feet into the desert, and said he was going to sit down. (*Id.* at 11, 104.) Defendant was unsteady on his feet as he walked. (*Id.* at 103.) Officer Miller asked Defendant again to perform some field sobriety tests, but Defendant

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refused and demanded to talk to an attorney, which by then was at 10:32 p.m. (*Id.* at 11, 30, 43.) At this point, Officer Miller placed Defendant under arrest. (*Id.* at 12, 43.) Officer Miller placed Defendant in the back of his patrol vehicle and waited for his backup unit to arrive. (*Id.* at 12.) He did not allow Defendant to call an attorney at that location because they were in a fairly desolated desert area at night, and Officer Miller feared for his safety. (*Id.* at 12.)

Officer Miller transported Defendant to the Pinnacle Peak Safety Facility, arriving there at 11:00 p.m. (R.T. of Aug. 26, 2010, at 12, 30, 35.) At 11:15 p.m., Officer Miller took the handcuffs off Defendant, placed him in the holding area, which was the only location available for a telephone call, and gave him access to the stationary telephone there. (*Id.* at 13, 15, 29, 35.) Defendant made two calls, and then somewhat later someone called back. (*Id.* at 14.) Officer Miller walked away from Defendant to the furthest place where he could still observe Defendant, which was 20 to 25 feet away. (*Id.* at 15–16, 19, 35, 37, 47.) At that point, Officer Miller could not hear Defendant's conversation and did not know to whom he was speaking. (*Id.* at 16, 36, 39, 48, 49.) Officer Miller said it is necessary for security reasons to keep a suspect in eyesight while the suspect is using the telephone because (1) the officer has checked in his firearm and therefore is unarmed, (2) the suspect is under arrest, and (3) the suspect is no longer handcuffed. (*Id.* at 105–06.) He thus stands as far away as the building allows to give the suspect privacy and still keep the suspect under observation. (*Id.* at 106.)

Once Defendant finished his telephone call, Officer Miller handcuffed him to the D–ring and read to him the Admin Per Se/Implied Consent Affidavit, whereupon, Defendant refused to submit to a blood draw. (R.T. of Aug. 26, 2010, at 16–17, 49–50.) Officer Miller received a search warrant at 12:20 p.m. and obtained a sample of Defendant's blood. (*Id.* at 17.) Testing of that blood sample showed Defendant had a BAC of 0.169. (*Id.* at 104.)

Jesse Squier testified he was a criminal defense attorney. (R.T. of Aug. 26, 2010, at 52, 60.) On July 19, 2009, he was on pager duty and spoke to Defendant by telephone. (*Id.* at 53–54.) He said he only spoke to Defendant for 2 minutes because Defendant told him there were two police officers approximately 12 feet away. (*Id.* at 54–55.) He said he told Defendant to request a private telephone call. (*Id.* at 55–56.) He then told Defendant that, because Defendant was not having a private conversation, he was not going to continue talking to him. (*Id.* at 57, 63–64.)

Defendant testified he had been drinking the day he got arrested. (R.T. of Aug. 26, 2010, at 66–68.) He said he asked for an attorney after Officer Miller arrested him. (*Id.* at 69.) He said while he was in the police station, there were two officers there, Officer Miller and a female officer, who was mostly out of sight. (*Id.* at 70.) He said the office was at first 10 feet away when he made the telephone call, and then move to a point 8 feet away. (*Id.* at 76–77.) He later said the officer was anywhere from 8 feet to 17 feet away, depending on which version of the facts one would believe. (*Id.* at 78.) He said he spoke to a person introduced as Jesse, and he asked Jesse if he should take a blood test. (*Id.* at 79, 81.) He said Jesse asked if an officer was there; he said the officer was 12 feet away; and then Jesse would not answer that question. (*Id.* at 81.) Defendant acknowledged the officer could not hear what Jesse was saying. (*Id.* at 92–93.)

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The trial court heard arguments of counsel and then took the matter under advisement. (R.T. of Aug. 26, 2010, at 108, 111, 120, 122.) On September 22, 2010, the trial court issued its Decision and Order denying Defendant's Motion To Dismiss. The trial court first noted the law grants to a suspect the right to a private consultation with an attorney. The trial court stated, however, this did not require a suspect to be placed in a sequestered area away from police control. The trial court then found (1) Officer Miller was 15 to 20 feet away from Defendant during this telephone call, (2) Officer Miller was not able to hear what Defendant said to the attorney, (3) Officer Miller did not try to listen to what Defendant was saying to the attorney, (4) Officer Miller did not interfere with the telephone call, and (5) Defendant could have made the telephone call more private merely by turning his back to Officer Miller. Finally, the trial court stated the police had the right to maintain security in the police station during the booking process. (M.E. of Sep. 22, 2010, at 1–2.)

On February 3, 2011, the matter proceeded to a jury trial, and the jurors found Defendant guilty of driving under the influence, A.R.S. § 28–1381(A)(1), and driving under the extreme influence, A.R.S. § 28–1382(A)(1). On April 6, 2011, the trial court imposed sentence, and on that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ABUSE ITS DISCRETION IN FINDING THE CONDUCT OF THE OFFICER DID NOT VIOLATE DEFENDANT'S RIGHT TO A PRIVATE TELEPHONE CONVERSATION WITH COUNSEL.

Defendant contends the trial court erred in finding the conduct of the officer did not violate his right to a private telephone conversation with counsel. In reviewing a trial court's ruling on a motion to dismiss or a motion to suppress, an appellate court is to defer to the trial court's factual determinations, including findings based on a witness's credibility and the reasonableness of inferences the witness drew, but is to review de novo the trial court's legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm*, 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010). Based on this Court's review of the record, this Court concludes the trial court properly denied Defendant's Motion To Dismiss.

The Arizona Supreme Court has held a suspect has the right to consult with an attorney prior to deciding whether to take a BAC test, provided that consultation does not disrupt an ongoing investigation by the police. *State v. Juarez*, 161 Ariz. 76, 80, 775 P.2d 1140, 1144 (1989). That court emphasized that right was the right to consult in private with an attorney. *State v. Holland*, 147 Ariz. 453, 711 P.2d 592 (1985). In the present case, the trial court found (1) Officer Miller was 15 to 20 feet away from Defendant during the telephone call, (2) Officer Miller was not able to hear what Defendant said to the attorney, (3) Officer Miller did not try to listen to what Defendant was saying to the attorney, and (4) Officer Miller did not interfere with the telephone call. (M.E. of Sep. 22, 2010, at 1–2.) Defendant, on the other had, testified he thought Officer Miller was able to hear what he was saying. As such, this case is similar to the following:

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Defendant initially argues that the trial court should have dismissed the charge against him because his right to counsel was violated. At the hearing on the motion to dismiss, defendant testified that he asked to speak with his attorney prior to taking the breath test. He maintained that the police told him just to take the test. Two police officers testified that defendant did not ask to call an attorney.

If defendant asked to speak with an attorney, he had a right to do so before taking the test. The conflicting testimony, however, created an issue of fact whether defendant actually made such a request. The responsibility of resolving factual disputes rests with the trial court. The trial court implicitly resolved the factual dispute in question against defendant in ruling that defendant had not been deprived of his right to counsel. Defendant does not claim that there is insufficient evidence to support such a finding. Under these circumstances, there is no basis for reversing the trial court's ruling.

*State v. Vannoy*, 177 Ariz. 206, 209, 866 P.2d 874, 877 (Ct. App. 1993). In the present case, Defendant thought Officer Miller was able to hear what he was saying, while Officer Miller testified he was not able to hear what Defendant was saying. This conflicting testimony created an issue of fact whether Officer Miller did hear what Defendant was saying, and the responsibility of resolving that factual disputes rested with the trial court. The trial court explicitly resolved that factual dispute against Defendant. This Court concludes there is sufficient evidence in the record to support such a finding. Under these circumstances, there is no basis for reversing the trial court's ruling.

Defendant contends, however, he has an absolute right to a completely private conversation with an attorney, which would mean being out of sight of the officers. But as noted by the Arizona Supreme Court, the right to consult with an attorney is not an absolute right, and exists only if that consultation does not disrupt an ongoing investigation. This Court concludes a suspect has the right to consult with an attorney prior to deciding whether to take a BAC test, provided that consultation does not disrupt the reasonable security measures taken by the police. In the present case, the trial court found the presence of Officer Miller was necessary to maintain security. This Court concludes the record fully supports that determination made by the trial court.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court properly denied Defendant's Motion To Dismiss.

**IT IS THEREFORE ORDERED** affirming the judgment and sentence of the Peoria Municipal Court.

**IT IS FURTHER ORDERED** remanding this matter to the Peoria Municipal Court for all further appropriate proceedings.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen

THE HON. CRANE MCCLENNEN  
JUDGE OF THE SUPERIOR COURT